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8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE WESTERN DISTRICT OF WASHINGTON  
10 AT SEATTLE

11 THE COMPHY CO.,

12 Plaintiff,

13 v.

14 AMAZON.COM, INC.,

15 Defendant.

Case No. 2:18-cv-01460-RSM

**DEFENDANT AMAZON.COM, INC.'S  
OPPOSITION TO PLAINTIFF THE  
COMPHY CO.'S SECOND AMENDED  
MOTION FOR PRELIMINARY  
INJUNCTION**

NOTE ON MOTION CALENDAR:  
NOVEMBER 2, 2018

Suite: 13206

Judge: Honorable Ricardo S. Martinez

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1 **I. INTRODUCTION**

2 This is a case about polyester bedsheets. Currently, when one searches on Amazon.com for  
 3 “comfy sheets,” “comphy sheets,” or some similar term, Amazon returns a list of products relevant to  
 4 that search. Plaintiff The Comphy Company has chosen not to sell its bedsheets on Amazon. But  
 5 competing products are sold on Amazon, and appear in response to that search. In this motion, The  
 6 Comphy Company seeks a preliminary injunction requiring, among other things, that Amazon return “No  
 7 Results” when someone searches on Amazon for “comfy sheets,” “comphy sheets,” or the like.

8 There are a number of problems with this claim. The most prominent is that it is directly contrary  
 9 to binding Ninth Circuit precedent. In *Multi Time Machine v. Amazon.com, Inc.*, the Ninth Circuit ruled  
 10 that precisely the conduct at issue here—Amazon’s practice of offering competing brands to consumers  
 11 searching for one specific brand—does not constitute trademark infringement, as a matter of law. That is  
 12 why Plaintiff, a company based in this District, initially filed this case in Illinois, in an attempt to evade  
 13 the effect of *Multi Time Machine*.

14 That is not the only problem: the next is that The Comphy Company actually doesn’t own any  
 15 trademark rights in the mark COMPHY. The Comphy Company owns no relevant trademark  
 16 registrations; its one registration is for its logo (and therefore irrelevant to alleged infringement through  
 17 words alone) and is for “linens and bedding for health spas” (and therefore irrelevant to alleged  
 18 infringement relating to home bedding). “Comphy” is a common misspelling of “comfy,” a term  
 19 descriptive of Plaintiff’s sheets. For that reason, in order to have trademark rights in that term, Plaintiff  
 20 would need to show that the relevant consumers regard COMPHY as an indicator of a particular source  
 21 of bedsheets, rather than as an adjective describing a positive quality of those bedsheets. Survey  
 22 evidence shows a net rate of recognition of one-half of one percent among the relevant consumers. This  
 23 alone would justify denial of the motion for preliminary injunction. And the remaining factors relating to  
 24 likelihood of success on the merits do not disturb that conclusion.

25 The Comphy Company has also failed to meet its burden to show a likelihood of irreparable harm  
 26 if a preliminary injunction is denied. Plaintiff has known about the key facts underlying its motion for  
 27 more than three years—since May 31, 2015, when its CEO took a screenshot of an Amazon search for  
 28 “comphy co sheets.” And Plaintiff’s employee responsible for contact with retail customers testified

that, setting aside regular seasonal variations, the magnitude of the issue with Amazon has remained the same as long as she had been at the company. To the extent there is any cognizable harm from the challenged conduct, it is compensable in damages (and therefore not irreparable), to the tune of precisely [REDACTED] for 2018.

But this is not a case that will reach a damages assessment, because The Comphy Company does not own trademark rights in the term COMPHY, and even if it did, the Ninth Circuit has ruled that Amazon's practice of offering competing products in response to searches is consistent with the trademark laws. The motion for preliminary injunction should be denied.

## II. FACTUAL BACKGROUND

According to the complaint, The Comphy Company sells "a variety of high end, luxury products, including luxury linens and bedding." Dkt. # 1 ¶ 7. The Comphy Company's "brand strategy has always focused on providing the most innovative, luxurious, and high-quality linens and sheets available, and excellent customer service." Dkt. # 34 ("Richardson Aff.") ¶ 19. "To that end, [The Comphy Company] brand products are not discounted, and are not offered with free shipping." *Id.* Prior to 2013, The Comphy Company did not sell directly to consumers. *Id.* ¶¶ 17-18; *see also* Dkt. # 34-11 at p. 25 ("[I]n effort not to compete with our vendors for the same end consumers, we do not sell to the public."). Although The Comphy Co. now sells directly to consumers, it does not advertise to consumers. Instead, it has "always marketed through [its] wholesale customers and the experience or word of mouth." Declaration of Joseph Gratz submitted herewith ("Gratz Decl."), Ex. A ("Richardson Dep. Tr."), at 130:3-16.

Amazon.com, Inc., through its subsidiaries (collectively, "Amazon"), is a leading online retailer of consumer goods, with retail websites and physical stores that focus on selection, price, and convenience. Gratz Decl., Ex. B ("Amazon 2017 10-K"), at 3. Amazon's websites "enable hundreds of millions of unique products to be sold by [Amazon] and by third parties across dozens of product categories." *Id.* Amazon views its principal competitive factors to include "selection, price, and convenience, including fast and reliable fulfillment." *Id.* at 4. Amazon "direct[s] consumers to [its] websites primarily through a number of targeted online marketing channels, such as . . . sponsored search . . . ." *Id.* at 28.



1 The Comphy Company has chosen not to sell its products on Amazon. Richardson Aff. ¶ 26.  
 2 When a consumer searches for “comphy company sheets” on Amazon, Amazon offers competing brand  
 3 sheets, including sheets marketed by a third-party Amazon seller called “Comfy Sheets.” Dkt. # 1-08 at  
 4 p. 2. Amazon also advertises that it sells “comfy sheets” on Google and Bing. Dkt. # 1-12 & 1-13.

5 On July 2, 2018, Plaintiff filed suit against Amazon. As discussed more fully below, The  
 6 Comphy Company claims, *inter alia*, that Amazon violates The Comphy Company’s rights under the  
 7 Lanham Act, 15 U.S.C. § 1051, *et seq.*, when, in response to a customer’s inquiry to search engines or  
 8 Amazon for “comphy sheets,” Amazon advertises and offers to sell consumers products that compete  
 9 with The Comphy Company’s products, including “comfy sheets.” Dkt. # 1 ¶¶ 19-24.

### 10 **III. PLAINTIFF HAS NOT ESTABLISHED A LIKELIHOOD OF SUCCESS ON THE** 11 **MERITS**

#### 12 **A. Ninth Circuit law applies to Plaintiff’s claims in this case, and holds that the very** 13 **conduct at issue does not violate the trademark laws.**

14 Plaintiff’s principal claim in this case is that Amazon violated the Lanham Act when a consumer  
 15 searched for “comphy company sheets” on Amazon, and—since Plaintiff’s products are not available via  
 16 Amazon—Amazon showed products not made by Plaintiff in response to that search, marked with those  
 17 products’ respective brand names. This is not the first time such a claim has been made against Amazon  
 18 by a company upset that consumers purchased competing products.

19 The Ninth Circuit considered a claim almost identical to The Comphy Company’s claim in 2015  
 20 and rejected it, in *Multi Time Machine, Inc. v. Amazon.com, Inc.*, 804 F.3d 930 (9th Cir. 2015). That  
 21 opinion controls this case.

22 In *Multi Time Machine*, the plaintiff, MTM, chose not to sell its wristwatches through Amazon.  
 23 When consumers searched for MTM’s wristwatches on Amazon, Amazon showed competing  
 24 wristwatches. MTM sued for trademark infringement, bringing a claim virtually identical to The  
 25 Comphy Company’s claim in this case: “that the design of Amazon’s search results page creates a  
 26 likelihood of initial interest confusion because when a customer searches for MTM Special Ops watches  
 27 on Amazon.com, the search results page displays the search term used—here, ‘mtm special ops’—  
 28 followed by a display of numerous watches manufactured by MTM’s competitors and offered for sale by

1 Amazon, without explicitly informing the customer that Amazon does not carry MTM watches.” *Multi*  
2 *Time Machine*, 804 F.3d at 936 (footnote omitted).

3 The Ninth Circuit held that “the products at issue are clearly labeled by Amazon to avoid any  
4 likelihood of initial interest confusion by a reasonably prudent consumer accustomed to online  
5 shopping.” *Id.* at 937-38. The court explained that “[w]hen a shopper goes to Amazon’s website and  
6 searches for a product using MTM’s trademark ‘mtm special ops,’ the resulting page displays several  
7 products, all of which are clearly labeled with the product’s name and manufacturer in large, bright, bold  
8 letters and includes a photograph of the item.” *Id.* at 938. “Because Amazon clearly labels each of the  
9 products for sale by brand name and model number accompanied by a photograph of the item, it is  
10 unreasonable to suppose that the reasonably prudent consumer accustomed to shopping online would be  
11 confused about the source of the goods.” *Id.*

12 MTM argued “that in order to eliminate the likelihood of confusion, Amazon must change its  
13 search results page so that it explains to customers that it does not offer MTM watches for sale before  
14 suggesting alternative watches to the customer.” *Id.* The Ninth Circuit disagreed: “The search results  
15 page makes clear to anyone who can read English that Amazon carries only the brands that are clearly  
16 and explicitly listed on the web page.” *Id.* “In light of the clear labeling Amazon uses on its search  
17 results page,” the Ninth Circuit held, “no reasonable trier of fact could conclude that Amazon’s search  
18 results page would likely confuse a reasonably prudent consumer accustomed to shopping online as to  
19 the source of the goods being offered.” *Id.*

20 This comports with consumer expectations in the offline world. If a customer walks into  
21 Nordstrom and asks where she can find a Citizen brand watch, a Nordstrom sales associate could fairly  
22 direct her to the Nordstrom watch counter, even if Nordstrom does not carry Citizen brand watches. And  
23 Nordstrom is not required to post a sign at the watch counter announcing, “Sorry, Nordstrom does not  
24 carry Citizen watches” to avoid accusations of trademark infringement. The situation is no different  
25 online. When a consumer asks Amazon for an MTM Special Ops watch, the Ninth Circuit held, Amazon  
26 should be able to direct the consumer to a virtual “watch counter” that displays clearly labeled  
27 alternatives. The Ninth Circuit conceded that it was “possible that someone, somewhere might be  
28

confused by the search results page.” *Id.* “But,” the court held, such “unreasonable, imprudent and inexperienced web-shoppers are not relevant.” *Id.* (internal quotation marks and citation omitted).

This explains why a bedsheet company based in the Western District of Washington initially brought this case in the Northern District of Illinois: because The Comphy Company knows that the Ninth Circuit’s holding in *Multi Time Machine* causes serious problems for its claim. Indeed, it appears to be the only justification for filing the case in Illinois, as the court in Illinois recognized. Gratz Decl., Ex. C at 2-3. Now that the case has been transferred to this Court, however, Ninth Circuit precedents—including *Multi Time Machine*—apply to Plaintiff’s claim, and control the result here. Just as a Nordstrom sales associate could direct a consumer to the watch counter when asked about a Multi Time Machine watch, the same sales associate could direct a consumer to the bedding department when asked about Comphy sheets. And Amazon does not commit trademark infringement by directing a consumer making the same inquiry online to a set of clearly labeled alternatives to Comphy sheets.

Plaintiff attempts to distinguish *Multi Time Machine* on one ground: They argue that here, the product search results lack the sort of “‘clear’ and ‘unambiguous’ branding” that would “‘eliminate’ initial confusion.” Mot. at 9 (quoting *Multi Time Machine*, 804 F.3d at 938). But the Amazon search-result layout at issue in *Multi Time Machine* is substantially identical to the layout at issue here. In both cases, each brand is identified by a brand name that appears after the product name: “by Luminox” or “by Chase-Durer” in the *Multi Time Machine* case, and “by Comfy Sheets” or “by HC COLLECTION” in the example that Plaintiff chose to include in its Complaint:



*Multi Time Machine*, 804 F.3d at 934 (detail).



Sponsored ⓘ

**Comfy Sheets Luxury 100% Egyptian Cotton - Genuine 1000 Thread Count 4 Piece Sheet Set-Fits Mattress Up to 18" Deep Pocket (Queen,...**  
by Comfy Sheets

**\$99<sup>99</sup>** ✓prime | FREE One-Day  
FREE Delivery by **Tomorrow, Jun 22**

★★★★★ ▾ 314



Sponsored ⓘ

**Hotel Luxury Bed Sheets Set-SALE TODAY ONLY! #1 Rated On Amazon..Ultra Silky Softest Bed Sheets 1800 Series Platinum Collection-...**  
by HC COLLECTION

**\$27<sup>89</sup>** ✓prime | FREE One-Day  
FREE Delivery by **Tomorrow, Jun 22**

★★★★★ ▾ 18,801

Dkt. # 1-08 at p. 2 (detail). Apart from the clarity of Amazon’s labelling, Plaintiff also appears to contend that *Multi Time Machine* is distinguishable on additional grounds it mentions only in its introduction, and does not discuss in connection with *Multi Time Machine* in the argument section of its brief. *First*, Plaintiff appears to contend that the inclusion of the designation “Amazon’s Choice” on a product in connection with a search for “comphy sheets” makes this case different from *Multi Time Machine*. While Amazon believes that designating a product as “Amazon’s Choice” among the search results for any given search does not create any likelihood of confusion, in the interest of narrowing the issues on this motion Amazon has disabled the “Amazon’s Choice” feature for all searches for bedding products that include the term “comphy.” Declaration of Kim Wilber submitted herewith (“Wilber Decl.”), ¶ 10. *Second*, Plaintiff argues that Amazon’s “ads on third party search engines, such as [G]oogle,” as set forth in Exhibit 12 to the Complaint, set this case apart from *Multi Time Machine* because those ads “falsely represent to potential customers that genuine Comphy brand products are available at Amazon.” Mot. at 4. But those ads are just as clearly labelled as the product listings in *Multi Time Machine*, identifying the third-party brand that in question (“Comfy Sheets”) and making no mention of Plaintiff’s brand name.

## Comfy Sheets Queen - Amazon | Free 2-day Shipping w/ Prime

 [www.amazon.com/bedding](http://www.amazon.com/bedding)

Compare Prices on Comfy sheets queen in Bedding. Read Ratings & Reviews. Explore Amazon Devices. Shop Our Huge Selection. Stream Videos Instantly. Shop Best Sellers & Deals.

As discussed below, Amazon does not believe that Plaintiff possesses trademark rights sufficient to prevent a competitor from calling its own comfy sheets “Comfy Sheets.” But if this Court finds that the third party who sells “Comfy Sheets” on Amazon is infringing Plaintiff’s rights, the relief on this motion should be limited to an order directing Amazon to remove “Comfy Sheets” from sale. Any broader relief would be directly contrary to *Multi Time Machine*.

### **B. The Comphy Company is not likely to succeed on the merits of its trademark infringement or false-designation-of-origin claims.**

“To prevail on a claim of trademark infringement under the Lanham Act, 15 U.S.C. § 1114, a plaintiff must prove: (1) it has a protectable ownership interest in the mark, and (2) defendant’s use of the mark is likely to cause consumer confusion.” *Nordstrom, Inc. v. NoMoreRack Retail Grp., Inc.*, No. C12-1853-RSM, 2013 WL 1196948, at \*2 (W.D. Wash. Mar. 25, 2013). In order to establish a protectable ownership interest in the mark, a plaintiff must come forward with an applicable trademark registration raising a presumption of a protectable ownership interest, or in the absence of a registration for the asserted mark must show “that, in the minds of the public, the primary significance of a product feature or term is to identify the source of the product rather than the product itself.” *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 851 n.11 (1982). With respect to likelihood of confusion, “[c]ourts look to eight relevant factors as an adaptable proxy: ‘(1) strength of the mark; (2) proximity of the goods, (3) similarity of the marks, (4) evidence of actual confusion, (5) marketing channels used, (6) type of goods and the degree of care likely to be exercised by the purchaser, (7) defendant’s intent in selecting the mark, and (8) likelihood of expansion of the product lines.’” *Nordstrom*, 2013 WL 1196948, at \*2 (quoting *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th Cir. 1979)). “[T]he *Sleekcraft* factors are not exhaustive and other variables may come into play depending on the particular facts presented.” *Multi Time Machine*, 804 F.3d at 936. “Indeed, in evaluating claims of trademark infringement in cases involving Internet search engines, [the Ninth Circuit has] found particularly important an additional



factor that is outside of the eight-factor *Sleekcraft* test: ‘the labeling and appearance of the advertisements and the surrounding context on the screen displaying the results page.’” *Id.* (quoting *Network Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d 1137, 1154 (9th Cir. 2011)).

“In certain contexts involving domain names or URLs, courts have used the ‘Internet troika’ approach, in which more emphasis is placed on three of the *Sleekcraft* factors: (i) similarity of the marks, (ii) relatedness of the goods and services, and (iii) simultaneous use of the Internet as a marketing channel.” *Nordstrom*, 2013 WL 1196948, at \*2. Plaintiff argues that these factors are “most important in the context of internet commerce.” Mot. at 8. But “this Court has also found that Internet consumers apply different levels of scrutiny depending on the circumstances, so this approach sheds little light” in other circumstances. *Nordstrom*, 2013 WL 1196948, at \*2. And, indeed, the Ninth Circuit has agreed, holding that “it makes no sense to prioritize the same three factors for every type of potential online commercial activity.” *Network Automation, Inc.*, 638 F.3d at 1148. Accordingly, as in *Nordstrom*, this Court should “not restrict its analysis” and should consider all the factors.

Plaintiff also brings a claim for false designation of origin under 15 U.S.C. § 1125(A)(1). Mot. at 15. “A claim for false designation of origin is subject to ‘[t]he same standard,’” as a claim for trademark infringement, “except a claim for false designation of origin does not require that the mark be registered.” *Celebrity Chefs Tour, LLC v. Macy’s, Inc.*, 16 F. Supp. 3d 1141, 1152 (S.D. Cal. 2014) (quoting *Brookfield Commc’ns, Inc. v. W. Coast Entm’t. Corp.*, 174 F.3d 1036, 1046 n.6 (9th Cir. 1999)).

**1. The Comphy Company’s trademark rights with respect to home bedsheets are exceptionally weak, if they exist at all.**

“The stronger a mark—meaning the more likely it is to be remembered and associated in the public mind with the mark’s owner—the greater the protection it is accorded by the trademark laws.” *Brookfield Commc’ns, Inc.*, 174 F.3d at 1058. “Two relevant measurements are conceptual strength and commercial strength.” *Network Automation, Inc.*, 638 F.3d at 1149. “Conceptual strength involves classification of a mark along a spectrum of generally increasing inherent distinctiveness as generic, descriptive, suggestive, arbitrary, or fanciful.” *Id.* (internal quotation marks and citation omitted). “Commercial strength is based on actual marketplace recognition, and thus advertising expenditures can transform a suggestive mark into a strong mark.” *Id.* Where a mark is low in conceptual strength, a

showing of commercial strength is necessary to establish that the mark has “secondary meaning”—“that, in the minds of the public, the primary significance of a product feature or term is to identify the source of the product rather than the product itself.” *Inwood Labs., Inc.*, 456 U.S. at 851 n.11.

We begin below by explaining why Plaintiff’s trademark registration for its logo does not give rise to a presumption that Plaintiff has rights in the word COMPHY (or any other related, non-registered mark). We go on to discuss the conceptual strength of Plaintiff’s mark, explaining that because Plaintiff’s sheets are comfy, the mark COMPHY is categorized as descriptive, and has very low conceptual strength. Finally, we discuss the commercial strength of Plaintiff’s rights in COMPHY, presenting survey evidence showing a net rate of recognition of one-half of one percent of consumers of luxury bedsheets, showing that the term COMPHY lacks secondary meaning.

**a. Plaintiff’s trademark registration gives rise to a presumption of secondary meaning only when used in connection with spa linens and only as to Plaintiff’s logo—neither of which is the case here.**

Plaintiff has only one trademark registration—No. 3,479,190, reproduced as Exhibit 5 to the Complaint. Dkt. # 1-05 at p. 2. “The mark consists of an enlarged, stylized ‘C’ that encompasses the letters ‘OMPHY’ in COMPHY, with the words ‘THE’ and ‘CO.’ being located above and below the ‘C’.” *Id.* The goods identified in the registration are “linens and bedding for health spas” and “robes for health spas.” *Id.*

Plaintiff argues that its trademark rights are strong because it has a registration, and that registration is “incontestable” pursuant to 15 U.S.C. § 1065. Dkt. # 71 at p. 5. That registration, however is irrelevant, because it is for a different mark and for different goods than those at issue here.

“[R]egistration constitutes prima facie evidence of a protected interest with respect to the goods specified in the registration only.” *Levi Strauss & Co. v. Blue Bell, Inc.*, 778 F.2d 1352, 1354 (9th Cir. 1985) (holding that a registration for a pocket tab on pants did not establish secondary meaning for a tab as applied to shirts). This lawsuit is about linens sized for use on a standard size bed, not linens and bedding for health spas. Richardson Dep. Tr. at 55:13-18. Linens and bedding for health spas are designed specifically for use on a massage table; they cannot be used on a standard size bed in a home. *Id.* at 35:11-37:11; 55:1-9. There is no overlap between the goods claimed in the registration (“linens and bedding for health spas”) and the goods at issue here (linens for use on beds, rather than massage

tables). The existence of Plaintiff's registration does nothing to establish that it has trademark rights with respect to the goods at issue here—home bedsheets.

Any presumption that results from registration “pertains to the whole mark . . . rather than to any individual portion of the mark.” *Igloo Prods. Corp. v. Brantex, Inc.*, 202 F.3d 814, 817 (5th Cir. 2000) (no presumption of secondary meaning in the words KOOL PAK where the registration was for the words KOOL PAK alongside a picture of a penguin). There is no claim that there has been infringing use of the stylized “C” logo in the form registered, or of any “enlarged, stylized ‘C’” at all. Thus, the registration gives rise to no presumption of any rights in any mark alleged to have been infringed here.

The same is true of any presumption arising out of the alleged “incontestable” status of Plaintiff's trademark registration, since “[a] registered mark is incontestable only in the form registered and for the goods or services claimed.” *In re Save Venice New York, Inc.*, 259 F.3d 1346, 1353 (Fed. Cir. 2001). *See also, e.g., E & J Gallo v. Proximo Spirits, Inc.*, No. CV-F-10-411 LJO JLT, 2012 WL 273076, at \*11 (E.D. Cal. Jan. 30, 2012) (“[T]he incontestable status of the 855 Registration does not establish that the broader 1800 trade dress, as defined, is inherently distinctive, because the Proximo plaintiffs cannot separate out and rely on only one incontestable element of the whole.”).

Plaintiff argues in its motion that in addition to the issued registration for its logo, Plaintiff has “filed for federal registration of its COMPHY mark.” Mot. at 7. “While plaintiff may have a ‘pending’ trademark application for the [COMPHY] mark, this does not entitle it to any statutory presumption of ownership, validity, or the exclusive right to use the mark in commerce.” *Pollution Denim & Co. v. Pollution Clothing Co.*, 547 F. Supp. 2d 1132, 1139 (C.D. Cal. 2007) (denying preliminary injunction). Thus, Plaintiff enjoys no presumption of secondary meaning in anything but its stylized logo, which Plaintiff does not allege was used. In order to establish that Plaintiff has a protectable ownership interest in the mark, Plaintiff must come forward with evidence showing that the mark is one protected by the trademark laws.

**b. The claimed trademark is descriptive since Plaintiff's bedsheets are, in fact, comfy (or “comphy”).**

Plaintiff's claimed mark COMPHY is highly descriptive, since it recites one positive quality of Plaintiff's goods—that they are, in fact, comfy. Such “[l]audatory marks that describe the alleged merit



of the goods are descriptive because they simply describe the characteristics or quality of the goods in a condensed form.” *In re Nett Designs, Inc.*, 236 F.3d 1339, 1341 (Fed. Cir. 2001). Plaintiff’s personnel confirm that the word “comfy” means “comfortable,” and that Plaintiff’s sheets are comfortable. Gratz Decl., Ex. D (“Zalman Winters Dep. Tr.”) at 62:24-63:8; Richardson Dep. Tr. at 79:8-18. Indeed, Plaintiff touts its sheets in interviews as “the most comfortable sheets.” Richardson Dep. Tr. at 146:15-147:11.

That Plaintiff chose to misspell the word “comfy” as “comphy” does not affect this analysis. People commonly misspell “comfy” as “comphy” in contexts that have nothing to do with Plaintiff. To demonstrate this, Amazon has conducted a search of all product reviews for the word “comphy.” Out of 2,520 reviews using the word “comphy,” only 227 have to do with bedding at all, and only 35 appear to be referring to Plaintiff. Wilber Decl. Ex. A.<sup>1</sup> Stated differently, when someone uses the word “comphy” in a review on Amazon, they are using it as a normal English word 98.7% of the time, and they are using it as a source identifier 1.3% of the time.<sup>2</sup> This natural experiment shows that the primary significance of the word “comphy” is not “to identify the source of the product,” *Inwood Labs*, 456 U.S. at 851, but instead to convey a synonym for “comfy” or “comfortable.”

And, even if “comphy” were an unusual or uncommon misspelling of the descriptive term “comfy,” the trademark laws treat all misspellings of descriptive terms as descriptive marks. As Learned Hand explained in a seminal 1927 opinion, that is because “a reader who knew how to spell might be in doubt whether the mistake was deliberate,” and “one who did not, would be unaware that it was a mistake at all.” *Oakland Chem. Co. v. Bookman*, 22 F.2d 930, 931 (2d Cir. 1927) (Hand, J.). Indeed, misspelled laudatory terms similar to COMPHY have been held descriptive in a number of past cases.

<sup>1</sup> Wilber Decl. Ex. 1 at lines 1-2520 (reproducing 2,520 reviews containing the word “comphy”), lines 2294-2520 (reproducing 227 reviews containing the word “comphy” that relate to bedding), lines 2486-2520 (reproducing 35 reviews containing the word “comphy” that appear to be referring to Plaintiff).

<sup>2</sup> Notably, many of those 1.3% are simply comparative references to Plaintiff. *See, e.g.*, Wilber Decl. Ex. 1 at line 2487 (“My favorite sheets are from Comphy Co but they are three times more expensive than these.”), line 2496 (“I purchased these as an alternative to the more expensive Comphy brand.”), line 2501 (“We previously had been using Comphy Company high end microfiber sheets we found during a B&B stay. These are just as soft with a bit more silkier feel.”)

1 *See, e.g., In Re Hunke & Jochheim*, 185 U.S.P.Q. (BNA) 188, 1975 WL 20781, at \*3 (T.T.A.B. Jan. 16,  
 2 1975) (DURABUL held descriptive for record books despite misspelling); *C-Thru Ruler Co. v.*  
 3 *Needleman*, No. 74-2019, 1976 WL 21018, at \*9 (E.D. Pa. Feb. 25, 1976) (C-THRU held descriptive for  
 4 transparent rulers despite misspelling).

5 **c. Survey evidence shows that the term COMPHY lacks secondary**  
 6 **meaning among the relevant consumers.**

7 Because it is descriptive of Plaintiff's goods (and is therefore not inherently distinctive), the mark  
 8 COMPHY is a valid trademark only if it has "secondary meaning." *See Fleischer Studios, Inc. v.*  
 9 *A.V.E.L.A., Inc.*, 654 F.3d 958, 967 (9th Cir. 2011). "The basic element of secondary meaning is . . . the  
 10 mental association by a substantial segment of consumers and potential consumers between the alleged  
 11 mark and a single source of the product." *Levi Strauss & Co.*, 778 F.2d at 1354 (internal quotation marks  
 12 and citation omitted). If a substantial segment of consumers associates a descriptive term with a single  
 13 company, the term has secondary meaning, and that company has trademark rights in that term. On the  
 14 other hand, if only "a sparseness of people" associate the mark with a single source, the term lacks  
 15 secondary meaning. *Norm Thompson Outfitters, Inc. v. Gen. Motors Corp.*, 448 F.2d 1293, 1297 (9th  
 16 Cir. 1971).

17 "An expert survey of purchasers can provide the most persuasive evidence on secondary  
 18 meaning." *Vision Sports, Inc. v. Melville Corp.*, 888 F.2d 609, 615 (9th Cir. 1989). Amazon  
 19 commissioned survey expert Hal Poret to design and conduct a study to determine whether the terms  
 20 COMPHY or COMFY have acquired secondary meaning in connection with bedding products. The  
 21 survey is described in detail in the Expert Report of Hal Poret. *See* Declaration of Hal Poret submitted  
 22 herewith, Ex. 1 ("Poret Report"). The survey compared the percentage of consumers of luxury bedding  
 23 who regard the term COMPHY as identifying a particular source of bedding products against a control  
 24 group asked whether they regard the non-existent brand COMFORT as identifying a particular source of  
 25 bedding products.<sup>3</sup>

26 \_\_\_\_\_  
 27 <sup>3</sup> Plaintiff's CEO confirmed that COMFORT is not a brand name for bedding. Richardson Dep. Tr. at  
 28 61:24-62:7. Thus, it is an appropriate control group with which to establish the level of survey "noise,"  
 which is subtracted from the absolute response level. Poret Report at 10. *See also* Shari Seidman

1 The survey results show that the term COMPHY lacks secondary meaning. The survey found  
 2 that only 13% of the consumers in the COMPHY test group said that they regarded the term COMPHY  
 3 as identifying a particular source for bedding—and virtually all of that was survey noise, since 12.5% of  
 4 the consumers asked about the non-existent brand COMFORT said that *it* identified a particular source  
 5 for bedding. Thus, the net level of recognition of the term COMPHY as identifying a particular source  
 6 for bedding was **0.5%**.

7 Courts routinely hold that much higher levels of association than a net association of 0.5% still  
 8 fail to show secondary meaning. *See, e.g., Brooks Shoe Mfg. Co. v. Suave Shoe Corp.*, 533 F. Supp. 75,  
 9 81 (S.D. Fla. 1981) (2.7% association insufficient for secondary meaning); *Citizens Banking Corp. v.*  
 10 *Citizens Fin. Grp., Inc.*, No. 07-11514, 2008 WL 1995104, at \*5 (E.D. Mich. May 6, 2008) (8%  
 11 association insufficient for secondary meaning); *Ashland Oil, Inc. v. Olymco, Inc.*, No. 94-5520, 1995  
 12 WL 499466, at \*4 (6th Cir. Aug. 21, 1995) (8% association insufficient for secondary meaning); *Roselux*  
 13 *Chem. Co. v. Parsons Ammonia Co.*, 299 F.2d 855, 862 (C.C.P.A. 1962) (10% association insufficient  
 14 for secondary meaning); *Zippo Mfg. Co. v. Rogers Imports, Inc.*, 216 F. Supp. 670, 689 (S.D.N.Y. 1963)  
 15 (25% absolute level of association insufficient for secondary meaning where control group showed  
 16 24.1% noise level).

17 Plaintiff, for its part, has chosen not to conduct a survey. “[A] plaintiff’s failure to conduct a  
 18 consumer survey, assuming it has the financial resources to do so, may lead to an inference that the  
 19 results of such a survey would be unfavorable.” *Cairns v. Franklin Mint Co.*, 24 F. Supp. 2d 1013, 1041  
 20 (C.D. Cal. 1998) (denying preliminary injunction). Perhaps at some later point in the litigation, Plaintiff  
 21 will choose to conduct a survey that it will present in an attempt to show that consumers regard  
 22 COMPHY as an identifier of a single source of bedding products. But at this stage, Amazon’s survey  
 23 stands alone, and shows unambiguously that COMPHY lacks secondary meaning.

24  
 25 Diamond, Reference Guide on Survey Research, in FEDERAL JUDICIAL CENTER REFERENCE MANUAL ON  
 26 SCIENTIFIC EVIDENCE 359, 399 (3d ed. 2011) (“Thus, the focus on the response level in a control group  
 27 design is not on the absolute response level, but on the difference between the response level of the  
 28 experimental group and that of the control group.”); *AMID, Inc. v. Medic Alert Found. United States,*  
*Inc.*, 241 F. Supp. 3d 788, 814 (S.D. Tex. 2017) (subtracting survey noise established using control group  
 from level of association in a secondary meaning survey).

1 The Court’s analysis can end here. “To prevail on a claim of trademark infringement under the  
 2 Lanham Act, 15 U.S.C. § 1114, a plaintiff must prove: (1) it has a protectable ownership interest in the  
 3 mark, and (2) defendant’s use of the mark is likely to cause consumer confusion.” *Nordstrom*, 2013 WL  
 4 1196948, at \*2. Plaintiff’s claim fails at the first step of that analysis, because Plaintiff lacks any  
 5 protectable ownership interest in the mark COMPHY—an unregistered, descriptive mark that lacks the  
 6 necessary secondary meaning to be protectable as a trademark. This motion can be denied on that basis  
 7 alone.

8 **2. The evidence of actual confusion is limited to consumers who purchased**  
 9 **COMFY sheets but intended to buy COMPHY sheets, and Plaintiff accepted**  
 10 **the risk of such confusion when it chose a common misspelling of a**  
 11 **descriptive word as its brand name.**

12 Plaintiff has come forward with some evidence of actual confusion. While the third-party seller  
 13 who markets its “Comfy Sheets” brand on Amazon has processed [REDACTED] orders for “Comfy Sheets” on  
 14 Amazon.com, Wilber Decl. ¶ 11, only 24 such purchasers have complained, either in Amazon reviews or  
 15 to Plaintiff.<sup>4</sup> In other words, the evidence suggests that for every order of “Comfy Sheets” that gave rise  
 16 to a complaint about confusion, there were [REDACTED] other orders that did not; [REDACTED] % of consumers of “Comfy  
 17 Sheets” gave no indication they were confused.

18 Notably, the *only* actual confusion claimed by Plaintiff relates to “Comfy Sheets”—not to any  
 19 other product sold on Amazon. Gratz Decl., Ex. E (“Jeffcoat Dep. Tr.”) at 87:24-88:19. Thus, as  
 20 discussed below, to the extent the Court concludes that this motion presents a problem that needs to be  
 21 addressed, any order should be limited to directing the removal of “Comfy Sheets” branded items from  
 22 Amazon, rather than any broader relief.

23 But the presence of a small amount of confusion, adding up to a fraction of a percent of all  
 24 purchasers, does not mean that there is a problem here that the trademark laws need to solve. The  
 25 trademark laws tolerate “a certain degree of confusion on the part of consumers,” especially where “an

26 <sup>4</sup> Wilber Decl. Ex. 1 at lines 2553-2567 (reproducing 14 reviews); Dkt. # 40-01 at pp. 2, 7, 10, 14, 15, 17,  
 27 23, 28, 30; Dkt. # 42 (reproducing contacts with 10 customers). Indeed, this likely overstates matters;  
 28 some of the 14 consumers who left reviews on “Comfy Sheets” on Amazon may have been the same 10  
 consumers who contacted Plaintiff having purchased “Comfy Sheets.”

originally descriptive term was selected to be used as a mark . . . .” *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 122 (2004). “If any confusion results, that is a risk the plaintiff accepted when it decided to identify its product with a mark that uses a well known descriptive phrase.” *Id.* (quoting *Cosmetically Sealed Indus., Inc. v. Chesebrough-Pond’s USA Co.*, 125 F.3d 28, 30 (2d Cir. 1997)). Plaintiff chose to adopt COMPHY as its brand name in part because “it sounds like the word ‘comfy.’” Richardson Dep. Tr. at 62:24-63:13. The price of that choice is a small amount of confusion—and that is the price Plaintiff is paying here.

**3. The target consumers are different, since Plaintiff targets only those who have slept on its bedsheets at particular hotels and bed-and-breakfasts, and Defendant targets all consumers of bedsheets.**

Plaintiff’s target market segment for its retail business (as opposed to its much larger wholesale business, which is not at issue in this case) is extremely narrow: Plaintiff does not “do any marketing into the large luxury linen market,” but instead has “always marketed through [its] wholesale customers and the experience or word of mouth.” Richardson Dep. Tr. at 130:3-16. In other words, as Plaintiff confirms in its brief, Plaintiff’s target consumers are those who are affirmatively “seeking genuine Comphy Sheets after having experienced the Comphy Sheets at a high-end spa or hotel.” Mot. at 16.

Amazon, by contrast, does not limit its sales to those who have stayed at particular bed-and-breakfasts. *See* Amazon 2017 10-K at 3 (“We design our websites to enable hundreds of millions of unique products to be sold by us and by third parties across dozens of product categories.”). Indeed, Plaintiff’s CEO accurately described some of the key differences between Plaintiff’s target customers and Amazon’s, referring to “[t]hat Amazon shopper looking for a good deal and free shipping,” Richardson Dep. Tr. at 136:15-19—people to whom Plaintiff makes no effort to market.

**4. Consumers of luxury bed sheets exercise a reasonable degree of care.**

With respect to the degree of care exercised by the group of consumers in question, Plaintiff relies entirely on *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199 (9th Cir.2000), which Plaintiff contends stands for the proposition that “Web users” in general exhibit a uniform low degree of care. Mot. at 14. Accepting this argument would be reversible error, as the Ninth Circuit explained in *Network Automation, Inc.*, 638 F.3d at 1153. There, the Ninth Circuit reversed a district court’s order granting a preliminary injunction, holding that “the district court improperly concluded that this factor weighed in

[Plaintiff's] favor based on a conclusion reached by our court more than a decade ago in *Brookfield* and *GoTo.com* that Internet users on the whole exercise a low degree of care." *Id.* "While the statement may have been accurate then, we suspect that there are many contexts in which it no longer holds true." *Id.* The sheets in question here are not an impulse purchase; they cost more than a hundred dollars. In fact, "the relevant consumer is a reasonably prudent consumer accustomed to shopping online; the kind of consumer who is likely to visit the [defendant's] website when shopping for an expensive product like a luxury [bedsheet set]." *Toyota Motor Sales, U.S.A., Inc. v. Tabari*, 610 F.3d 1171, 1176 (9th Cir. 2010).

It is true that a small group of consumers apparently did not exercise the degree of care necessary to notice that "Comfy Sheets" were not the "Comphy" sheets they were looking for. But when one is shopping for a particular brand of sheets by a descriptive brand name, prudence requires checking to make sure the brand name is (mis)spelled correctly. "Unreasonable, imprudent and inexperienced web-shoppers are not relevant." *Id.* at 1176. The fraction of a percent of those shopping specifically for COMPHY sheets who didn't notice that they were instead buying "Comfy Sheets" fall into that category. Accordingly, the degree of care exercised by the relevant consumers does not weigh in favor of a finding of likelihood of confusion.

**5. There is no evidence that Amazon intended to confuse consumers, only that Amazon offered competing products to consumers who search for Plaintiff's products.**

There is no evidence that Amazon intended that consumers purchase third parties' bedsheets believing themselves to be purchasing Plaintiff's bedsheets. Instead, the evidence reflects that Amazon shoppers who were shopping for Plaintiff's sheets decided to purchase different sheets instead. For example, as one consumer review posted on Amazon for a set of Nouvelle Legende sheets recounts:

I was looking to buy genuine Comphy sheets when I came across this set on Amazon. These are indeed very nice sheets. Perhaps not as silky as the Comphy sheets, but smooth and silky enough to please me. The real value lies in the price, which is half what the Comphy sheets sell for.

Wilber Decl. Ex. A at line 2488. Or, as another Mellanni consumer said in a review:

I purchased these as an alternative to the more expensive Comphy brand. At first I was concerned that the quality was not so great; the weight of the fabric is much less substantial than Comphy. But they came through the first washing just fine, they fit the mattress well, and are super soft and comfortable.



*Id.* at line 2496. *See also, e.g., id.* at line 2504 (“They’re not expensive, and I was trying them as I hoped they would serve as a replacement for the Comphy brand spa sheet sets that we prefer (but that are five times the cost).”); *id.* at line 2508 (“I ordered the charcoal gray color in the Twin XL size and am trying these as a spare set instead of the Comphy brand microfiber spa sheets that we’ve used for the last five or six years (but that are five times the price).”); *id.* at line 2490 (“I wanted to find a cost effective equivalent to these \$150 Comphy sheets I slept on at a bed and breakfast and these came highly recommended through reviews.”); *id.* at line 2507 (“I have slept on the ‘Comphy’ brand at a resort. These are so close that it is hard to tell the difference other than the price. I would STRONGLY recomend [sic] anyone trying to decide between the two to get these and save the money!”); *id.* at line 2505 (“I have just slept on comphy sheets at a B&B and these are comparable to them at about a third of the cost.”).

Selling bedsheets to consumers who shop around for a better value does not reflect an intent to mislead consumers; instead, as the Ninth Circuit has held, it reflects a lawful intent to “truthfully inform them of their choice of products.” *Network Automation, Inc.*, 638 F.3d at 1153. Thus, this factor does not weigh in favor of a finding of likelihood of confusion.

**C. The Comphy Company is not likely to succeed on the merits of its contributory-infringement claim.**

Plaintiff argues that, in addition to being liable as a direct trademark infringer, Amazon is liable as a contributory infringer, for having “continue[d] to supply a product knowing that the recipient is using the product to engage in trademark infringement.” *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996); Mot. at 16. There are two principal problems with this claim.

*First*, a claim for contributory trademark infringement requires a showing that a third party is a direct infringer of Plaintiff’s rights. But as discussed above, Plaintiff lacks trademark rights in COMPHY that would support a claim of infringement even against the third party who sells “Comfy Sheets” on Amazon. Since there is no actionable direct infringement, there can be no contributory liability.

*Second*, Amazon had and has no knowledge that the seller of “Comfy Sheets” is violating Plaintiff’s trademark rights in the term COMPHY. That is because, as discussed above, Amazon reasonably believes that Plaintiff lacks any trademark rights in the term COMPHY, which is a descriptive

term lacking in secondary meaning. Merely knowing that Plaintiff existed is not enough; Plaintiff would need to show that Amazon continued to supply its services to the seller of “Comphy Sheets” knowing that those sheets infringed Plaintiff’s legitimate rights. There is no evidence of that, and indeed Amazon’s view that Plaintiff lacks rights in the mark COMPHY has been further strengthened by the results of the secondary-meaning survey conducted in connection with this motion.

**IV. PLAINTIFF HAS NOT ESTABLISHED IRREPARABLE HARM OR THE OTHER NECESSARY ELEMENTS FOR A GRANT OF PRELIMINARY INJUNCTION**

**A. The Comphy Company has not met its burden to show a likelihood of irreparable harm.**

There is no longer any presumption of irreparable harm in trademark cases, even upon a showing of likelihood of success on the merits. Instead, “a plaintiff must establish irreparable harm [in order to receive] a preliminary injunction in a trademark infringement case.” *Herb Reed Enters., LLC v. Fla. Entm’t Mgmt., Inc.*, 736 F.3d 1239, 1249 (9th Cir. 2013). The Comphy Company has failed to do so here, for two key reasons discussed below: because Plaintiff knew about the facts underlying its claim for *more than three years* before filing this case, and because Plaintiff admits that the harm it is suffering will be compensable with money damages if Plaintiff is successful at trial.

**1. There is no emergency justifying a preliminary injunction.**

**a. Plaintiff has known about the facts underlying this motion since at least May 31, 2015.**

“A preliminary injunction is sought upon the theory that there is an urgent need for speedy action to protect the plaintiff’s rights.” *Lydo Enters., Inc. v. City of Las Vegas*, 745 F.2d 1211, 1213 (9th Cir. 1984) (citation omitted). For that reason, a plaintiff’s “long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm.” *Oakland Tribune, Inc. v. Chronicle Publ’g Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985).

Here, Plaintiff’s own documents show that Plaintiff has known about the key facts underlying this motion since at least May 31, 2015—more than three years before this case was filed. In her deposition, Plaintiff’s CEO was presented with a screenshot taken on May 31, 2015 showing an Amazon.com search for “comphy co sheets.” Three brands of sheets are offered in response to the search, but none of them are Plaintiff’s sheets. Plaintiff’s CEO confirmed that she herself took this screenshot on May 31, 2015



1 and circulated it within the company. Richardson Dep. Tr. at 12:19-20:9. And she confirmed that  
 2 Plaintiff raised no objection to the results as shown in that screenshot at that time. *Id.* at 20:10-16. To  
 3 the extent Plaintiff's claim rests on Amazon's provision of competing products in response to a search  
 4 for Plaintiff's company name, Plaintiff was on notice of that claim more than three years before the case  
 5 was filed, and such a long delay "implies a lack of urgency and irreparable harm" necessary for issuance  
 6 of a preliminary injunction. *Oakland Tribune, Inc.*, 762 F.2d at 1377.

7 In discussing the screenshot in her deposition, Plaintiff's CEO identified two issues present in this  
 8 motion that do not appear on the face of the screenshot: Amazon's practice of running Google AdWords  
 9 advertisements seeking to sell competing goods to those searching for Plaintiff's products, and the  
 10 presence of the third-party "Comfy Sheets" on Amazon's site. Richardson Dep. Tr. 17:6-18:4. But  
 11 neither of those is a recent development, either. Plaintiff knew about Amazon's Google AdWords  
 12 advertisements at least by September 10, 2015, when Plaintiff wrote to Google (but not Amazon)  
 13 regarding Amazon's advertisements on Google seeking to sell competing sheets to those searching for  
 14 Plaintiff's name. Richardson Dep. Tr. at 21:10-28:8 & Gratz Decl. Ex. F ("Richardson Dep. Ex. 4"). So  
 15 even if Plaintiff did not know about Amazon's search advertising as of May 31, 2015, Plaintiff certainly  
 16 knew about that advertising as of September 10, 2015, more than three years ago.

17 Nor is the presence of "Comfy Sheets" of particularly recent vintage. Plaintiff was on notice of  
 18 the presence of those third-party items on Amazon.com at least as early as April 5, 2017, when an  
 19 internal email thread indicates that Molly Zalman Winters, the person at The Comphy Company in  
 20 charge of trademark matters, received notice of those items. Gratz Decl. Ex. G ("Zalman Winters Dep.  
 21 Ex. 6") & Zalman Winters Dep. Tr. at 57:13-59:5. Far from taking immediate action, Ms. Zalman  
 22 Winters was of the view that "it looks like they aren't doing anything wrong" because "it's all coming up  
 23 under 'comfy.'" Zalman Winters Dep. Ex. 6 at COMPHY000154.

24 Thus, even assuming that Plaintiff needed to wait until all of the facts had come in before taking  
 25 action, Plaintiff was aware of all of the facts underlying its motion no later than April 5, 2017, and waited  
 26 at least one year and four months before filing its motion for preliminary injunction. Shorter delays have  
 27 been found to weigh against issuance of a preliminary injunction. *See, e.g., Studio Red Inc. v. Rockwell*  
 28 *Architecture Planning & Design, P.C.*, No. C 07-396 CW, 2007 WL 1462458, at \*4 (N.D. Cal. May 18,

2007) (denying preliminary injunction after delay of eight months); *Spiraledge, Inc. v. SeaWorld Entm't, Inc.*, 109 U.S.P.Q.2d 1774, 1779, 2013 WL 3467435 (S.D. Cal. July 9, 2013) (denying preliminary injunction because 13 month delay negated irreparable injury).

Accordingly, Plaintiff's delay weighs against a finding of irreparable harm and issuance of a preliminary injunction.

**b. The magnitude of this issue has remained constant for more than a year.**

Plaintiff attempts to justify seeking a preliminary injunction by saying in its CEO's declaration that there is a "suddenly increasing threat to the Comphy brand." Richardson Aff. ¶ 27. But in fact, Plaintiff's employee responsible for communicating with retail customers testified that the rate at which customers contact Plaintiff about sheets that turn out to have been made by "Comfy Sheets" has remained constant since early 2018, and have remained steady, accounting for seasonal changes in the retail industry, since that employee started working for Plaintiff. Jeffcoat Dep. Tr. at 32:10-14. The present status quo has been unchanged for more than a year, and there is no evidence of a new, sudden, or impending threat to Plaintiff.

**2. The claimed harm is compensable in damages.**

In order to receive a preliminary injunction, Plaintiff must show, in addition to the other elements, that "it is likely to suffer irreparable harm in the absence of preliminary relief." *Herb Reed Enters., LLC*, 736 F.3d at 1247. "Purely monetary injuries are not normally considered irreparable." *Lydo Enters., Inc.*, 745 F.2d at 1213. "Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence" of a preliminary injunction are not enough. *Sampson v. Murray*, 415 U.S. 61, 90 (1974) (quoting *Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958)). "The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." *Id.* Here, two facts confirm that the claimed harm is compensable in money damages.

First, Plaintiff's CEO estimated in deposition that the annual amount by which net sales were affected as a result of the challenged conduct was a number "[REDACTED]" Richardson Dep. Tr. at 96:22-97:3; *see id.* at 95:11-97:14 (discussing the effect of the challenged conduct on net sales). No

1 matter what number “[REDACTED]” may be arrived at by the jury if Plaintiff is ultimately successful  
 2 in pressing its claims, Amazon will be able to pay that figure.

3 *Second*, the Plaintiff’s claim of urgency arises out of its view that Plaintiff “will not meet its 2018  
 4 budget if this situation is not remedied immediately.” Mot. at 18. Plaintiff claims that this “shortfall  
 5 with the projected growth” is the result of Amazon’s conduct. Mot. at 17. Specifically, Plaintiff expects  
 6 that if a preliminary injunction does *not* issue, its retail sales will grow by 24.2% in 2018 over 2017.  
 7 Richardson Dep. Tr. at 98:11-18; Richardson Aff. ¶ 29. Plaintiff regards this extraordinarily high rate of  
 8 growth as evidence of harm, however, since Plaintiff had hoped that retail sales would instead grow by  
 9 approximately 34% in 2018 over 2017. *Id.*; see Mot. at 19. But even to the extent year-over-year growth  
 10 of 24.2% can be regarded as harm, it is not *irreparable* harm, because we can calculate the amount of  
 11 money Amazon would need to pay if Plaintiff were ultimately to be successful. According to Plaintiff’s  
 12 CEO’s declaration, web retail sales in 2017 totaled \$ [REDACTED] Richardson Aff. ¶ 18. Growth at  
 13 Plaintiff’s hoped-for 34% rate would lead to sales in 2018 of \$ [REDACTED] Richardson Aff. ¶ 18. If a  
 14 preliminary injunction does not issue and growth instead occurs at Plaintiff’s expected rate of 24.2%, that  
 15 would lead to sales in 2018 of \$ [REDACTED] a shortfall of \$ [REDACTED] If Plaintiff were ultimately successful  
 16 in proving that some wrongful conduct by Amazon resulted in damage in that amount, Amazon would be  
 17 able to pay that figure, as well.

18 Accordingly, because Plaintiff has not demonstrated a need for immediate injunctive relief—both  
 19 because Plaintiff has known about the facts underlying its claim for years and because the claimed harm  
 20 would be compensable with money damages—the motion for preliminary injunction should be denied.

21 **B. The balancing of the equities does not favor issuance of a preliminary injunction.**

22 Plaintiff’s sole argument that the balancing of the equities favors issuance of a preliminary  
 23 injunction is the argument that Amazon is a very large company, while Plaintiff is a smaller company.  
 24 Mot. at 20. But as discussed above with respect to the lack of irreparable harm, there is no claim that  
 25 Plaintiff will suffer anything other than the temporary loss of money, which Amazon can pay in the event  
 26 (unlikely, in Amazon’s view) that Plaintiff is ultimately successful at trial. Thus, because there is no  
 27 existential or lasting threat to either party, the balancing of the equities tilts neither in favor of nor against  
 28 issuance of a preliminary injunction.

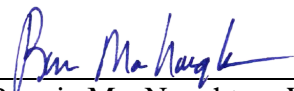
**C. The proposed preliminary injunction is vague and overbroad, and the public interest would be disserved by the grant of an injunction**

Plaintiff's proposed preliminary injunction is vague, overbroad, and inconsistent with the Ninth Circuit's holding in *Multi Time Machine*. As discussed above, Plaintiff distinguishes that case only by arguing that the presence of the "Comfy Sheets" brand runs afoul of the trademark laws notwithstanding *Multi Time Machine*. Mot. at 8-9. Amazon does not believe that Plaintiff's trademark rights are strong enough to prevent another company from calling their comfy sheets Comfy Sheets—as borne out by the survey evidence and reviews discussed above. But if this Court disagrees and believes that Plaintiff has met its burden to show that COMPHY has gained secondary meaning among a substantial segment of consumers and that "Comfy Sheets" are likely to be found to infringe Plaintiff's trademark rights, any injunction should be limited in scope to require only the removal of the "Comfy Sheets" brand from sale during the pendency of this litigation. But when someone comes to Amazon looking for Plaintiff's sheets, Amazon should be able to try, if it can, to sell them clearly-labelled HC Collection sheets, or Mellanni sheets, or Urbanhut sheets, or Nouvelle Legende sheets, or even AmazonBasics sheets instead of Plaintiff's sheets.

**V. CONCLUSION**

For the foregoing reasons, Plaintiff has not met its burden to show a likelihood of success on the merits or a probability of irreparable harm. The motion for preliminary injunction should be denied.

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 29, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to those attorneys of record registered on the CM/ECF system. All other parties (if any) shall be served in accordance with the Federal Rules of Civil Procedure

Dated this 29th day of October, 2018.

/s/ Bonnie MacNaughton

Bonnie MacNaughton, WSBA #36110